COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Docket No. 2015-P-0509

JOHNSON GOLF MANAGEMENT, INC.

Plaintiff-Appellee,

v.

TOWN OF DUXBURY and the NORTH HILL ADVISORY COMMITTEE, consisting of MICHAEL DOOLIN, CHAIRMAN, SCOTT WHITCOMB, ROBERT M. MUSTARD, JR., MICHAEL MARLBOROUGH, ANTHONY FLOREANO, MICHAEL T. RUFO, THOMAS K.GARRITY, RICHARD MANNING, W.JAMES FORD, and GORDON CUSHING (EX OFFICIO),

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF
THE MIDDLESEX SUPERIOR COURT

Corrected Brief of Defendants-Appellants

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July 2, 2015

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STATEMENT OF THE ISSUES

1. Whether General Laws Chapter 93A was intended to waive the Town of Duxbury's sovereign immunity.

2. Whether Chapter 93A applies to the Town's procurement process required under General Laws Chapter 30B.

3. Whether the Town's conduct of a procurement process required under Chapter 30B constituted "trade or commerce" under Chapter 93A.

4. Whether the Town is liable for a willful or knowing violation of Chapter 93A where the jury found that it did not act in bad faith under Chapter 30B.

5. Whether the Town is liable for multiple damages under Chapter 93A where there was no evidence that the Town Manager - as distinct from its outside counsel - willfully or knowingly committed an unfair or deceptive violation.

STATEMENT OF THE CASE

In December 2008, Johnson Golf Management, Inc. ("Johnson Golf") brought this case against the Town of Duxbury and its North Hill Advisory Committee

(collectively, the "Town"). A-4.[1] On January 21, 2009, Johnson Golf amended its claims against the Town and asserted claims against CALM Golf, Inc. and its principal Charles Lanzetta. A-5, A-105-124. The Amended Verified Complaint claimed (among other counts later dismissed by stipulation) that the Town violated the Uniform Procurement Law, Chapter 30B, and the Consumer Protection Act, Chapter 93A, in awarding the management contract for the North Hill Country Club to CALM Golf. A-105-124.

In April 2013, the Superior Court held a 14-day jury trial. Tr-1769. During the trial and at the conclusion of the evidence, the Town moved for a directed verdict. A-390-408; Tr-1614-1619. The Court denied those motions. A-18; Tr-1619.

The jury found that the Town violated Chapter 30B in its procurement process for the North Hill management contract, but that it did not act in bad faith. However, the jury also found that the Town committed a willful and knowing unfair or deceptive act or practice in that procurement process in

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[1] "A-__" refers to the Appendix, "Tr-__" refers to the Appendix of Trial Transcripts, and "Ex-__" refers to the Appendix of Trial Exhibits.

violation of Chapter 93A. It found that Johnson Golf lost net profits of $200,000 as a result, which it doubled to $400,000. A-409-412.

On May 14, 2013, Johnson Golf requested an award of attorneys' fees of $484,146.60 plus costs. A-18. On June 24, 2013, the Town opposed that application. Id. On that date, it also moved for Judgment Notwithstanding the Verdict or, Alternatively, to Alter and Amend the Judgment on the Chapter 93A claim (the "JNOV Motion"). A-413. On August 5, 2013, Johnson Golf opposed the Town's Motion. A-415. On September 16, 2013, the Court denied the JNOV Motion, and it awarded Johnson Golf $325,000 in fees and costs. A-435.

Judgment entered on September 23, 2013. A-436. The Town timely filed its notice of appeal on October 15, 2013. A-438.

STATEMENT OF FACTS

North Hill Country Club

The Town owns the North Hill Country Club, a nine-hole public golf course and clubhouse. A-106. The Town does not operate North Hill itself, but obtains management services from an outside vendor pursuant to the Uniform Procurement Act, General Laws Chapter 30B.

Ex-184. The North Hill Advisory Committee ("NHAC") is a volunteer board appointed to advise the Board of Selectmen about operations at North Hill. Tr-674.

The Procurement of Services Under Chapter 30B

Chapter 30B is "a public bidding statute designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally." Northeast Energy Partners, LLC v. Mahar Regional School Dist., 462 Mass. 687, 693 (2012). For service contracts with an annual value of $25,000 or more, a town must conduct a formal advertised competition by issuing an invitation for bids ("IFB") or a request for proposals ("RFP"). G.L. c. 30B, § 6. The RFP process uses competitive sealed proposals when the town's chief procurement officer ("CPO") determines that it is in the best interest of the public to compare factors beyond price. Id.

Section 6 lays out the RFP process in detail. An RFP describes the intended purchase, evaluation criteria and contractual terms. Each response contains a price proposal (the price offered for the good or service) and a non-price proposal (how the proposer qualifies under the other criteria). The CPO gives the

non-price proposals to appointed evaluators, who evaluate them based on the RFP criteria. Each proposal is evaluated as "highly advantageous, advantageous, not advantageous, or unacceptable" on each criterion, followed by a composite rating. The CPO then determines the "most advantageous proposal from a responsible and responsive offeror" based on the price proposals and the evaluations of the non-price proposals. He awards the contract to the successful proposer. Because a procurement process pursuant to an RFP under Section 6 includes non-price criteria, the contract need not necessarily be awarded to the proposer with the best price.

The Town's Procurement Process for North Hill

Johnson Golf began managing North Hill in 1995, and was awarded a 10-year contract by the Town effective January 1, 1999. A. 346, Tr. 869, 874. In October 2008, with that contract scheduled to expire at the end of the year, the Town issued an RFP pursuant to Chapter 30B, Section 6 ("RFP #1") to manage North Hill for five years, from January 1, 2009 to December 31, 2013. Ex-184. Gordon Cushing, the Recreation Director, was initially responsible for drafting the North Hill RFP. Tr-667, 678-679. In an

effort to avoid disputes, particularly in light of Johnson Golf's history of suing municipalities over procurement, Richard MacDonald, then-Town Manager and CPO, asked Robert Troy, Town Counsel for nearly 26 years, to "quarterback" the process and ensure that it was done legally. Tr-808-809.

RFP #1 included the phrase "comparable business enterprise" in the description of the proposers' "Relevant Experience." Ex-187. After several years of denying to the Duxbury Selectmen and the Superior Court that he was responsible for that phrase, Troy ultimately admitted that he had inserted it into the RFP. Tr-250-251, 730.

The Town received five proposals in response to RFP #1, including proposals from Johnson Golf and CALM Golf. Tr-131. After reviewing the evaluations of the non-price proposals with Cushing, MacDonald rejected all the proposals, as Chapter 30B, Section 9 authorizes when a town deems rejection to be in its best interest. Ex-431; G.L. c. 30B, §9. He did so based on Troy's advice that rejection was required by the Office of the Inspector General because one of the evaluators did not appropriately list his composite score for each proposer. Tr-811. In addition, CALM

Golf's price proposal was not in the proper form. Tr-749. Troy directed MacDonald's secretary, Barbara Ripley, to send out the rejection letter, and she signed MacDonald's name to it. Tr-812; Ex-1204. Johnson Golf filed its initial complaint over the rejection of its proposal. A-21-33.

The Town immediately proceeded with a second RFP ("RFP #2").[2] Tr-641. In January 2009, it received proposals from the same five companies. Tr-151. On the non-price proposals, Johnson Golf and CALM Golf received identical composite scores from the evaluators, based on the categories of "Relevant Experience," "Organizational Capability," "Maintenance Equipment/Staff" and "Financial Information." Ex-707. CALM Golf claimed to have extensive experience through its principal Charles Lanzetta and to be able to obtain the required landscaping equipment. Ex-577-589. In its price proposal, CALM Golf offered the Town $92,500 more than Johnson Golf. Ex-708.

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[2] RFP #2 changed the payment to the Town from a "flat yearly payment" in RFP #1 to a "yearly payment". Tr-642. Cushing made that change without instruction from anyone else, although it was reviewed and approved by Troy. Id. In all other respects, the RFPs were the same. Id.

MacDonald did not review the proposals received for RFP #2. Tr-1031-1032. He again relied on the evaluations and on instructions from Troy. Id. Where the non-price evaluations ranked Johnson Golf and CALM Golf as equal, and CALM Golf offered the Town more money, Troy instructed MacDonald to award the contract to CALM Golf. Tr-726, 814, 1110. Troy wrote the award letter and told MacDonald to sign it.[3] Tr-814, 818. MacDonald did so without questioning its contents; he relied on Troy to ensure it was accurate. Tr-813-818. On January 15, 2009, he awarded the North Hill management contract to CALM Golf.[4] Ex-707-710.

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[3] Johnson Golf claims that CALM Golf could not have legitimately achieved ratings of "highly advantageous" for "Relevant Experience" or "Financial Information" because it had little experience running a golf course and minimal assets. A-111-113. However, there was no evidence that the evaluators had ill intent or were anything but poorly trained. Tr-154-161, 1572-1573.

[4] In January 2009, Johnson Golf amended its Complaint and sought a preliminary injunction to prohibit the award of the contract to CALM Golf. A-5. On February 3, 2009, the court granted that motion, ordering the Town to permit Johnson Golf to continue to operate North Hill during the litigation. A-6. Johnson Golf did so pursuant to that order from January 1, 2009 until April 2011. A-12, 422.

In November 2010, the court granted the Town's motion to cancel its contract with CALM Golf and re-bid its contract. A-422. Duxbury cancelled the management contract with CALM Golf and re-bid the contract, this time under an IFB process. A-347. Johnson Golf did not submit a bid. The Town awarded Pilgrim Golf, Inc. the

Troy directed each step of the procurement process and MacDonald relied on that direction. Tr-642, 1033, 1352. Indeed, MacDonald testified repeatedly and without rebuttal that he had no problem awarding the contract to Johnson Golf. E.g., Tr. 812, 826.

Johnson Golf's Claims

Johnson Golf claimed that the Town's procurement process for the North Hill management contract violated Chapter 30B, Section 6 in bad faith and willfully or knowingly violated Chapter 93A. A-115-123.[5] At trial, Johnson Golf asserted four primary

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contract to manage and operate North Hill, and Pilgrim Golf took over the management of North Hill from Johnson Golf in April 2011. A-12, 422.

These subsequent events - the preliminary injunction, cancellation of the CALM Golf contract, re-bidding of the contract and award to Pilgrim Golf - were the subject of a limiting instruction from the court at trial. The jury was permitted to consider them only to the extent relevant to the initial award of the contract to CALM Golf in January 2009. Tr-1727. Johnson Golf dropped its claim against CALM Golf. Tr-1738.

[5] Johnson Golf included the NHAC in the suit based on allegations that its members were miffed at Johnson Golf's policy about signing up for tee times and wanted to prevent an award to Johnson Golf. A-108-109, Tr-676-677. Johnson Golf spent a significant amount of time at trial on this issue, but elicited no evidence that the NHAC (or the Selectmen) tried to influence the procurement process to prohibit an award to Johnson Golf. Tr-812, 1363, 1406. Johnson Golf did not

instances of wrong-doing. It argued that (1) the phrase "comparable business enterprise" was inserted into the RFPs to attract other proposers and avoid an award to Johnson Golf, (2) the rejection of all proposals under RFP #1 was improper because CALM should have been disqualified and the Town's reason for the rejection was inadequate, (3) the change in the description of the price proposal in RFP #2 was an attempt to benefit CALM Golf, and (4) the award of the contract to CALM Golf was based on erroneous evaluations of CALM's experience and financial capability. Tr-56-77.

The Jury Verdict

On April 24, 2013, the jury returned a verdict for Johnson Golf. It found that the Town violated Chapter 30B in awarding the management contract to CALM Golf, but found that the Town did not do so in bad faith. However, the jury also found that the Town violated Chapter 93A, that it did so willfully or knowingly, and that the violation rested on the conduct of Mr. MacDonald. It awarded Johnson Golf

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ultimately pursue any claims against the Committee at trial.

$200,000 in lost profits, and doubled those damages to $400,000. A-409-412[6]

The Superior Court's Post-Trial Decision

In the Memorandum of Decision and Order on Defendants' Post Trial Motions ("JNOV Decision"), the Superior Court denied the Town's motion to set aside the jury's verdict on the Chapter 93A claims. A-421-435.

The court rejected the Town's arguments under Rule 50(b) that it could not be liable under Chapter 93A as a matter of law. It held that (1) the Town was acting in "trade or commerce" because ownership of a golf course "does not in any way relate to governmental activity"; (2) the availability of Chapter 30B remedies for bidding violations does not preclude liability for the same under Chapter 93A; and (3) Chapter 93A implicitly waived municipalities' sovereign immunity. It rejected the Town's sovereign immunity argument "in the absence of definitive guidance from the appellate courts ... that

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[6] Johnson Golf waived its claim to damages for a non-bad faith violation of Chapter 30B - its bid preparation costs - by failing to present any evidence of those costs. See Tr-1632-1633 (the only damages under Chapter 30B were those submitted to the jury under Chapter 93A for lost profits).

municipalities acting in a business context are not amenable to suit under G.L. c. 93A." A-424-425.

The court also rejected the Town's arguments under Rule 59(e) that the jury verdict should be amended to reflect that the Town is not liable under Chapter 93A where jury found that it did not act in bad faith. The court ruled that the verdict was not inconsistent because "[f]inding 'bad faith' on the part of a defendant is not a prerequisite or a necessary element for finding a violation of [Chapter 93A]." A-431.

ARGUMENT

I. Standards of Review.

In reviewing the denial of the Town's JNOV Motion (Sections II, III and IV, below), this Court affords no deference to the trial judge's decision. MacCormack v. Boston Edison Co., 423 Mass. 652, 659 (1996).

With respect to the jury verdict on the Chapter 93A claim (Section V, below), the Court reviews the findings of fact underlying that verdict for clear error, but reviews the Superior Court's legal conclusions *de novo*. Fed. Ins. Co. v. HPSC, Inc., 480 F.3d 26, 34 (1st Cir. 2007). Where the trial court is wrong on the controlling legal standard, no deference

is given to the conclusions supporting the verdict. Klairmont v. Gainsboro Rest., Inc., 465 Mass. 165, 171 (2013).

II. The Town is Immune from Suit Under Chapter 93A.

Massachusetts appellate courts have not decided whether the state and its political subdivisions are immune from Chapter 93A liability on the basis of sovereign immunity. M. O'Connor Contracting, Inc. v. City of Brockton, 61 Mass. App. Ct. 278, 284 n.8 (2004) ("Whether a governmental entity is ever amenable to suit under c. 93A remains an open issue."). They have not had to reach that issue because they have found either that the conduct was not unfair or deceptive or that the government entity was not acting in trade or commerce. See Park Drive Towing, Inc. v. City of Revere, 442 Mass. 80, 85-86 (2004). Thus, until this case, the state and its municipalities have never been held liable under Chapter 93A. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V., et al. v. Whitehead Institute for Biomedical Research, et al., 850 F. Supp. 2d 317, 329 (D. Mass. 2011) (Saris, J.) ("Max-Planck").

A municipality is immune from liability unless the Legislature has waived that immunity. Todino v.

Town of Wellfleet, 448 Mass. 234, 238 (2007). A waiver of sovereign immunity is effective only if accomplished by express terms or made "clear by necessary implication from the statute's terms." DeRoche v. Mass. Comm'n Against Discrimination, 447 Mass. 1, 12-13 (2006). Thus, the Town is immune in from Johnson Golf's claims unless the Legislature expressly or necessarily waived that immunity in enacting Chapter 93A.

The Legislature did neither. Both the SJC and this Court have found that Chapter 93A contains no express waiver of sovereign immunity. Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436, 439 (1998); M. O'Connor, 61 Mass. App. Ct. at 284 n.8. The court below did not find such a waiver. The only question is whether a waiver is clear by "necessary implication" from the statutory terms.

A. There is no implied waiver of sovereign immunity in the language of Chapter 93A.

Nothing in the language of Chapter 93A indicates a legislative intent to waive sovereign immunity and extend the statute to apply to the Commonwealth and its subdivisions. The statute applies to a "person," which it defines as "where applicable, natural

persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." G.L. c. 93A, § 1(a).

In Max-Planck, inventors brought Chapter 93A claims against the University of Massachusetts, an agency of the Commonwealth, for improperly licensing intellectual property. 850 F. Supp. 2d at 326-327. The court held that UMass was entitled to sovereign immunity and dismissed those claims. It held that the phrase "any other legal entity" in the definition of "person" in Chapter 93A, while broader than the default definition in G.L. c. 4, § 7, clause 23,[7] "does not require an implication of government liability" and is "not a sufficient basis on which to find that the Legislature intended to waive sovereign immunity in Chapter 93A." Id. at 330.

The federal court also noted that, when the Legislature wants a statute to encompass governmental entities, it explicitly includes them in the definition of "person". Id. (citing G.L. c. 151B, § 1); see, e.g., G.L. c. 21E, § 2; G.L. c. 94C, § 1;

[7] This definition, which refers to only "corporations, societies, associations and partnerships," excludes the Commonwealth and its subdivisions. Woods Hole v. Town of Falmouth, 74 Mass. App. Ct. 444, 447 (2009).

G.L. c. 110A, § 401(h). As this Court has noted, "the Legislature knew how to include language and words in a statute," and its failure to do so can only be interpreted as deliberate. Thomas v. Dep't of State Police, 61 Mass. App. Ct. 747, 754 (2004).

In Max-Planck, the court acknowledged that courts have interpreted "person" under Chapter 93A to include governmental entities as plaintiffs, and noted the desirability of reading a statutory term consistently where appropriate. Nevertheless, it found that having different interpretations regarding the government's role in the statute is "preferable to finding a waiver of sovereign immunity based largely on judicial resolution of a different question." 850 F. Supp. 2d at 331. See Lafayette Place Assoc. v. Boston Redevelopment Auth., 427 Mass. 509, 536 n. 29 (1998) ("Cases ... in which the public entity may act as a plaintiff in a c. 93A action are not apposite.").

The federal court also rejected the argument that governmental liability is "necessary to effectuate the legislative purpose" of the statute. 850 F. Supp. 2d at 330. It found that Chapter 93A is not premised on any governmental obligation, in contrast to the cases declining to find sovereign immunity because the

statutory scheme was aimed directly at the government. Id., citing Todino v. Town of Wellfleet, 448 Mass. 234, 238 (2007) (municipal obligation under G.L. c. 41, § 111F to pay interest to incapacitated workers); Bates v. Director of Office of Campaign and Political Fin., 436 Mass. 144, 174 (2002) (state obligation under G.L. c. 10, § 42 to make payments under the clean elections law). Therefore, it concluded, "Chapter 93A is not rendered 'ineffective' by excluding the Commonwealth." Id.

In this case, in contrast to the federal court's careful and thorough analysis, the Superior Court's treatment of the implied waiver issue under Chapter 93A was fundamentally flawed. First, the court relied on the catch-all "any other legal entity" in the definition of "person" to imply a waiver of sovereign immunity. A-429. But as the federal court in Max-Planck properly recognized, that catch-all phrase falls far short of the "clear by necessary implication" standard for an implied waiver of sovereign immunity. See DeRoche at 13. Indeed, reading that phrase to refer to governmental entities violates the maxim of *noscitur a sociis* ("a word is known by the company it keeps"), under which the phrase should

be read to refer to entities like the ones listed - *i.e.*, private ones. E.g., Yates v. United States, 135 S. Ct. 1074, 1085 (2015). In fact, the statutory language itself refutes the court's conclusion. The definition of "person" includes "any other legal entity" (as well as the listed entities) only "where applicable." G.L. c. 93A, § 1(a). That phrase confirms that the definition, even with a catch-all, does not apply universally.

Second, the court found that Chapter 93A "does not contain any legislative intent to exclude the government from the statute's operation." A-429. That precisely reverses the applicable test. Under DeRoche, a waiver of sovereign immunity requires a clear legislative intent to *include* government entities, not the absence of intent to *exclude* them.

Third, the court relied on the maxim of statutory construction that a statutory term should be read consistently. A-429. But that maxim of consistent interpretation, like all such maxims, is not a wooden rule to be applied in a vacuum. It is an aid to interpretation, an inference about legislative intent. In re Gray, 378 B.R. 728, 734 (Bankr. D. Mass. 2007) ("Rules of statutory construction are often helpful,

but, in the end, they are just guideposts to legislative meaning."). As the court concluded in Max-Planck, it must yield to the fundamental principle that a waiver of sovereign immunity requires a clear expression of intent by the Legislature.

Finally, the court found that "if Chapter 93A is to have fair application for every party that engages in 'trade or commerce,' ... governmental liability under the statue is necessary to effectuate its legislative purpose." A-430. However, that reasoning is entirely circular: it assumes that the statute applies to every party engaged in trade or commerce. The statute does not apply so broadly; it applies only to "persons". The court assumed the very point to be decided, avoiding the issue of whether the Legislature intended Chapter 93A to apply to government entities.

Such a broad reading is not necessary to effectuate the legislative purpose. Unlike under the statutory schemes cited in Max-Planck, claims against governments are a small minority of Chapter 93A jurisprudence. See *Chapter 93A Rights and Remedies*, Index (MCLE, 3rd ed. 2014) (of the 1127 cited cases, only 3.1% list governmental bodies as defendants). Chapter 93A will continue to broadly regulate

marketplace behavior even if the Town is immune; sovereign immunity will have virtually no impact on the effectiveness of that regulation. That conclusion is evident from the robustness of Chapter 93A even though no governmental entity has ever been held liable under the statute.

B. Finding an implied waiver of immunity would contravene other important policies.

Significant policy considerations militate against reading an implied waiver of sovereign immunity into Chapter 93A.

First, the statute carries the potential for the imposition of punitive damages, as were awarded in this case. Drywall Sys., Inc. v. ZVI Constr. Co., 435 Mass. 664, 670 n. 4 (2002) (multiple damages under Chapter 93A are punitive damages). Courts are loath to impose such damages on governmental bodies. M. O'Connor Contracting, 61 Mass. App. Ct. at 286 (vacating judgment confirming arbitration award that included punitive damages against the City). The purpose of punitive damages is to punish bad actors and deter future similar behavior. Id. at 285 n. 12. Awarding multiple damages against a municipality does not accomplish that purpose. Such an award "punishes only

the taxpayers, who took no part in the wrongful conduct, but who nevertheless may incur an increase in taxes or a reduction in public services as a result of the award." Id.

Second, imposing Chapter 93A liability on municipalities would conflict with the Massachusetts Tort Claims Act, G.L. c. 258 (the "MTCA"). The MTCA is a comprehensive statute governing the waiver of sovereign immunity for tort claims against the Commonwealth and its subdivisions. Although it describes causes of action that come within its jurisdiction and those that do not, it does not mention Chapter 93A. Id., §§ 2, 10. Moreover, the MTCA excludes intentional torts from its waiver of sovereign immunity. Id., § 10(c); Lafayette Place Assocs. v. Boston Redevelopment Auth., 427 Mass. 509, 535 (1998) (the BRA is immune from suit for intentional torts under the MTCA).

Chapter 93A claims can sound in tort, including an intentional tort such as fraud. Standard Register Co. v. Bolton-Emerson, Inc., 38 Mass. App. Ct. 545, 548 (1995). Subjecting governmental bodies to such liability would negate the MTCA's explicit exclusion of intentional torts from the waiver of sovereign

immunity. It also would circumvent MTCA's other limits, which include a different presentment requirement, a $100,000 damages cap, and the absence of a fee-shifting provision. It "would be illogical to suggest that when the Legislature enacted c. 93A, the Legislature intended to subject the Commonwealth to multiple damages for a broad range of intentional conduct, including fraud and deceit." Estate of Janowicz v. Mass. State Lottery Comm'n, 1994 WL 879359 *4 (Mass. Super. Oct. 12, 1994).[8] Generally, this Court will not find that the Legislature intended to waive immunity and subject the Commonwealth and its subdivisions to unlimited and unconditional liability by implication where it had enacted a limited and condition scheme of liability covering the same conduct. See Commonwealth v. Elm Laboratories, 33 Mass. App. Ct. 71 (1992) (State Civil Rights Act).

[8] For example, in Daniel v. Mass. State Lottery Comm'n, 2003 WL 22699807, at *1 (Mass. Super. July 15, 2003), the plaintiff sued the Commission for fraud for failing to pay on a ticket. The court granted summary judgment for the Commission on the basis of sovereign immunity. Id. at 4. The Legislature cannot have intended that the Commission would have been subject to liability if the plaintiff had brought the very same claim under Chapter 93A.

For these reasons, the Town is immune from Chapter 93A liability. The Superior Court's JNOV Decision to the contrary should be reversed.

III. Chapter 93A does not Apply to Violations of Chapter 30B.

Even if the Town is not immune from liability under Chapter 93A, that statute should not apply in cases arising under Chapter 30B. Chapter 93A does not apply where "the presence of a comprehensive and specific alternate scheme of regulation of the targeted conduct [is] in actual or potential conflict with the standards and remedies of the [Chapter 93A]." McGonagle v. Home Depot, U.S.A., Inc., 75 Mass. App. Ct. 593, 602-603 (2009) (specific tax provisions in G.L. c. 62C conflict with and preclude a claim under Chapter 93A); Darviris v. Petros, 442 Mass. 274, 282-284 (2004) (same regarding G.L. c. 231, the medical malpractice statute); Reiter Oldsmobile, Inc. v. General Motors Corp., 378 Mass. 707, 711 (1979) (standards for motor vehicle industry in G.L. c. 93B are coherent and more specific, precluding remedy under Chapter 93A); Fleming v. National Union Fire Ins. Co., 445 Mass. 381, 385-386 (2005) (comprehensive nature of G.L. c. 152, the workers' compensation

statute, precludes claim under Chapter 93A). One ground for finding a potential conflict with Chapter 93A is the availability of remedies more specific to the claimed conduct. E.g., Zimmerman v. Rogoff, 402 Mass. 650, 663 (1988) (alternative liability for breach of fiduciary duty bars Chapter 93A liability); Cabot v. Baddour, 394 Mass. 720, 725-726 (1985) (specific remedies in securities law, G.L. c. 110A, bars Chapter 93A liability); see Riseman v. Orion Research, Inc., 394 Mass. 311, 313-314 (1985) (Chapter 93A relief not available to shareholder, in part because he was "not without an alternative method of obtaining relief").

Imposing Chapter 93A liability for bidding violations conflicts with more specific relief provided under Chapter 30B. Parties injured by Chapter 30B violations have specific damages remedies. New England Insulation Co. v. General Dynamics Corp., 26 Mass. App. Ct. 28, 30-31 (1988). An innocent breach entitles a wronged bidder to recovery of its bid preparation costs. Paul Sardella Constr. Co. v. Braintree Housing Auth., 3 Mass. App. Ct. 326, 333-335 (1975). A bad faith or intentional breach entitles the bidder to recovery of its lost profits. Peabody

Construction Co., Inc. v. City of Boston, 28 Mass. App. Ct. 100 (1989); Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass. App. Ct. 349, 359 (1987) (finding lost profits sufficient to vindicate the public interest and make wronged bidder whole).

The remedies under Chapter 93A sharply contrast with those under Chapter 30B in both situations. For innocent violations, Chapter 93A provides for compensatory damages (instead of just the reliance damages of bid preparation costs) and attorneys' fees and costs. And for more egregious violations, it provides for punitive damages (instead of just the compensatory damages of lost profits), as well as attorneys fees and costs. If it applied to public bidding violations, Chapter 93A would supersede Chapter 30B. The contrast in remedies confirms that Chapter 93A was not intended to apply in that context.

The trial court responded to this argument by noting that the cases cited by the Town below did not involve "a public authority engaging in 'trade or commerce' under Chapter 93A." A-427. That response entirely missed the point. The cases cited by the Town set out the remedies under Chapter 30B, which are carefully circumscribed and far more limited than the

ones under Chapter 93A. The fact that those cases did not involve government entities is irrelevant; the whole question is whether to subject government entities to the same exposure.[9] Doing so would ignore the "careful limitation on private remedies" under Chapter 30B and render those remedies "surplusage." Reiter v. General Motors Corp., 378 Mass. 707, 711 (1979) (G.L. c. 93B).

Based on the cases cited above under a variety of statutes and the consistent policy they reflect, the Town is entitled to judgment on this issue.

IV. Chapter 93A Does Not Apply in this Case Because a Procurement Process under Chapter 30B is not Trade or Commerce.

A person is liable under Chapter 93A only if it is engaged in trade or commerce. Park Drive Towing, Inc. v. City of Revere, 442 Mass. 80, 86 (2004). In determining whether a municipality acted in trade or commerce, the court reviews "the nature of the transaction, the character of the parties involved and [their] activities ... and whether the transaction was motivated by business ... reasons." Id. A party is not

[9] The court's comment that the Town did not argue that Chapter 30B remedies are exclusive, A-427, is simply wrong. That is exactly what the Town argued, at least with respect to alternate remedies under Chapter 93A.

engaging in trade or commerce "when its actions are motivated by legislative mandate." Id.; see M. O'Connor Contracting, 61 Mass. App. Ct. at 284 ("[I]t is well established that governmental entities are not amenable to suit under c. 93A when they have engaged in governmental activity rather than trade or commerce.").

Here, Johnson Golf claimed that the Town did not conduct the bidding process for the North Hill management contract fairly or properly under Chapter 30B. The challenged conduct relates solely to the Town's actions in the public bidding process. It does not relate to its actions as the lessor or operator of North Hill: there is no claim that the Town breached a lease, defrauded a supplier, swindled a golfer, or the like. The distinction between the statutory public procurement process and the underlying activity or service that is the subject of the bidding is crucial. In conducting the bidding process, the Town was acting pursuant to legislative mandate and performing a function required only of a government body.

In another, similar case brought by Johnson Golf, then-Superior Court Judge Sikora recognized that distinction, holding that Chapter 93A did not apply to

the City's conduct in awarding a management contract for the Franklin Park Golf Course to another bidder. Johnson Turf and Golf Management, Inc. v. City of Boston, et al., C.A. No. 01-5637-A (Suffolk Super. Ct. December 27, 2006) ("Johnson Turf") (included in the Addendum). He described the central character of procuring management services for a municipal golf course as its regulation by Chapter 30B, which is unique to governmental entities. Johnson Turf at 5 ("private actors in the marketplace do not bear the regulatory responsibilities of this process [which] imposes responsibility upon governmental buyers different from those engages in general trade and commerce"). Judge Sikora concluded that the "applicability of the Uniform Procurement Act to distinctly governmental conduct weighs heavily against the applicability of c. 93A." Id.

In this case, the Superior Court rejected the Town's "trade or commerce" argument on the ground that "the Town's ownership of the golf course ... does not in any way relate to governmental activity." A-425. Thus, the court glossed over the key distinction between the underlying activity and required public

bidding relating to it. It did not even cite Johnson Turf.[10]

Instead, the court offered a spurious argument regarding Phipps Products Corp. v. Massachusetts Bay Trans. Auth., 387 Mass. 687 (1982). It characterized the Town as relying on Phipps Products for the "broad proposition that the failure to abide by public bidding procedures immunizes a governmental entity from all private rights of action." A-425-426. The Town made no such argument; such a failure clearly exposes the governmental entity to a claim under Chapter 30B. It cited Phipps Products, which was cited in Johnson Turf, for its recognition that public agencies conducting procurement under a regulatory scheme are different than private parties contracting in the marketplace. That case supports the Town's

[10] The court also stated that "the defendants in their Answer, admit that the Town had engaged in trade or commerce through its ownership of the golf course." A-425. That comment misconstrues the Town's pleading. The Town admitted that "the purpose of operating the North Hill Country Club Golf Course is to generate revenue for Duxbury and to provide the residents and the general public with a facility to play golf." A-107, 284. It never admitted that its conduct of the Chapter 30B public bidding process was in "trade or commerce." In fact, it raised this "trade or commerce" argument in its summary judgment motion. In denying the motion, the court did not assert that the Town had waived this issue. A-308.

argument that public bidding of a golf course management contract - as distinct from the lease or operation of the course itself - is not trade or commerce.

Because the Town's procurement process for the North Hill management contract did not constitute trade or commerce, Chapter 93A does not apply. Judgment should enter for the Town.

V. The Town is Not Liable for a Willful or Knowing Violation of Chapter 93A in These Circumstances.

Even if the Town is liable under Chapter 93A notwithstanding the arguments above, there is no basis for the imposition of double damages on it.

A. Where the Jury Found that the Town did not Act in Bad Faith under Chapter 30B, the Town did not Violate Chapter 93A Willfully or Knowingly as a Matter of Law.

Johnson Golf has never attempted to differentiate between the Town's conduct violating Chapter 30B and that constituting a willful or knowing violation of Chapter 93A. See, e.g., Tr-75-76, 1680-1709. Where the jury found that the Town did not violate Chapter 30B in bad faith, its verdict that the same conduct constituted a "willful or knowing" violation of Chapter 93A cannot stand.

In denying the Town's Motion to Alter or Amend the Judgment, the trial court held that a finding of no bad faith under Chapter 30B is not inconsistent with a finding of an unfair and deceptive act under Chapter 93A. It concluded that Chapter 93A, § 11 does not explicitly require bad faith for an act to be unfair or deceptive. A-430-432. Even if that is right, however, a *knowing or willful* unfair act or practice, subjecting the Town to punitive damages, surely *does* require bad faith.[11]

Courts routinely refer to "bad faith" to describe the defendant's "subjectively culpable state of mind" required to prove a willful or knowing violation of Chapter 93A. E.g., Kapp v. Arbella Mut. Ins. Co., 426 Mass. 683, 686 (1998); Bonofiglio v. Commercial Union Ins. Co., 411 Mass. 31, 36 (1991); Shaffer v. Shoemaker & Jennings, Inc., 1995 WL 1293392, at *7 (Mass. Super. Oct. 11, 1995).

In its jury instructions, the court below defined "bad faith" as "a dishonest purpose or some moral

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[11] The Town argued below that, where the jury found no bad faith, it cannot have violated Chapter 93A at all. It did not focus on the "willful or knowing" verdict, and the court therefore did not address it. The Town's focus on the entire Chapter 93A verdict did not waive the narrower argument presented here.

obliquity" implying "conscious doing of wrong" and "breach of a known duty through some motive of interest or ill will." Tr-1730. It instructed that, to find "bad faith," the jury had to find sufficient evidence that "Richard MacDonald conscientiously acted with a dishonest purpose, self-interest or ill will in awarding the North Hill Management Contract to CALM Golf in January of 2009." Tr-1731. The jury found that Mr. MacDonald's actions in conducting the procurement and awarding the contract to CALM Golf were not done in bad faith. Thus, those actions cannot be considered willfully or knowingly unfair or deceptive. The jury verdict finding a "willful or knowing" violation of Chapter 93A cannot stand.

B. The Town Cannot be Subject to Punitive Damages Where There was no Evidence that Richard MacDonald Acted Willfully or Knowingly in Violating Chapter 93A.

The multiple damages provisions of Chapter 93A are designed to impose a penalty that varies with the culpability of the defendant. Kansallis Finance Ltd. v. Fern, 421 Mass. 659, 673 (1996); International Fidelity Ins. Co. v. Wilson, 387 Mass. 841, 856 (1983). Whereas vicarious liability under Chapter 93A is appropriate even where the principal was unaware of

and uninvolved in the violation, vicarious liability for multiple damages requires more. In Kansallis, the SJC held that, in the partnership context, "some further showing or culpability or involvement must be made to justify multiple damages" against an innocent and uninvolved partner. 421 Mass. at 676. The appropriateness of vicarious liability for multiple damages may vary in different contexts. Thus, for example, partnerships and corporations should not automatically be equated for the purpose of assessing multiple damages on them for the knowing and willful conduct of their agents. Id. at 673 & n. 11 (declining to rule on other corporate or partnership structures).

In this case, Mr. MacDonald, as the Town's Chief Procurement Officer, was involved in the award of the management contract to CALM Golf. Hence the jury verdict that the Town's Chapter 93A liability was "based on" his conduct. A-412. However, he had no personal culpability in that award. Town Counsel unilaterally ran the North Hill procurement process. He drafted the key language in the RFP, instructed Mr. MacDonald to reject the first round of bids, drafted the rejection letter, directed MacDonald's secretary to send that letter, and advised him that he had to

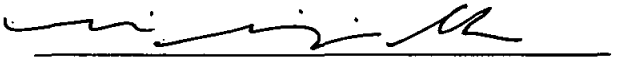
award the contract to CALM Golf in the second round, among other steps. MacDonald relied completely on Town Counsel's handling of that process and advice on the contract award. Tr-808, 825, 1057; see also Statement of Facts, above. And there is no suggestion in the record that such reliance at that stage was unreasonable based on past history or Town Counsel's past conduct.

In these circumstances and on this record, the judgment should be vacated with respect to punitive damages. Punishing the Town for the aberrant conduct of its outside counsel would serve no proper purpose. If the Town is liable under Chapter 93A at all, single damages and attorneys fees and costs fully accomplish the purposes of Chapter 93A of deterring conduct that violates the statute and compensating Johnson Golf for its injury.

CONCLUSION

The judgment for Johnson Golf should be reversed and judgment should be ordered for the Town. At the very least, the imposition of double damages on the Town should be vacated.

By its attorneys,



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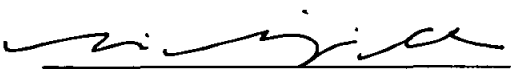
July 2, 2015

Mass. R. App. P. 16(k) Certification

I certify that this Corrected Brief complies with the rules of court that pertain to the filing of briefs, including but not limited to MRAP 16, 18 and 20.



Nina Pickering-Cook

ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
MICV 2008-04641

JOHNSON GOLF MANAGEMENT, INC.

vs.

TOWN OF DUXBURY & others[1]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' POST TRIAL MOTIONS

The plaintiff, Johnson Golf Management, Inc. ("Johnson Golf"), brought this action against the defendants alleging violations of G. L. c. 30B and G. L. c. 93A. Following a jury trial, the jury returned a verdict in the form of answers to questions that found that the defendant Town of Duxbury (the "Town") violated G. L. c. 30B, the violation of Chapter 30B was not in bad faith, and that the Town committed a willful or knowing unfair or deceptive act or practice in violation of G. L. c. 93A. The defendants now move for judgment notwithstanding the verdict, or alternatively, to alter and amend the judgment on the G. L. c. 93A claim. Additionally, the defendants oppose Johnson Golf's application for attorneys' fees and costs. For the following reasons, the defendants' motions are **DENIED** and the plaintiff's application for fees and costs is **ALLOWED** in part and **DENIED** in part.

BACKGROUND[2]

The facts pertinent to the motions before the Court that are supported by the credible evidence presented at trial are as follows.

The Town owns a nine hole municipal golf course known as the North Hill Country Golf

[1] North Hill Advisory Committee, consisting of Michael Doolin, Chairman, Scott Whitcomb, Robert M. Mustard, Jr., Michael Marlborough, Anthony Floreano, Michael T. Rufo, Thomas K. Garrity, Richard Manning, W. James Ford, and Gordon Cushing (ex officio), Calm Golf, Inc., Charles Lanzetta.
[2] The Court has adopted undisputed facts from a joint pre-trial motion filed on September 12, 2012.

Course. Johnson Golf is a golf management company owned by Doug Johnson and operated by him and others.

From 1996 until December 31, 2008, Johnson Golf operated North Hill pursuant to several contracts with Duxbury, the last of which ended on December 31, 2008. In September 2008, in anticipation of the expiration of the existing contract, Duxbury issued a Request for Proposals in accordance with G. L. c. 30B, §6 ("RFP #1") for the management of North Hill from January 1, 2099 through December 31, 2013.

In December 2008, after receiving proposals in response to RFP #1, Duxbury rejected all the proposals, cancelled RFP #1 and reissued an RFP for the management of North Hill ("RFP #2"). Johnson Golf filed this action on December 12, 2008, after the rejection of the proposals in response to RFP #1. In January 2009, Duxbury received five (5) proposals in response to RFP #2, including ones from Johnson Golf and CALM Golf. Duxbury awarded the North Hill contract to CALM Golf.

In November 2010, with the court's permission, Duxbury cancelled its contract with CALM Golf and re-bid the contract. Johnson Golf did not submit a bid. From January 1, 2009 until April 2011, Johnson Golf operated North Hill pursuant to an order of this court.

In April of 2011, an entity called Pilgrim Golf took over the operation of the Country Club pursuant to an award by the Town and an order of this court.

On April 24, 2013, a jury returned a verdict in favor of Johnson Golf against the defendants in the amount of $200,000.00. As a result of the 93A violation, the award was doubled, for a total award of $400,000.00. The jury indicated that its verdict was based on the conduct of the Town through its Chief Procurement Officer Richard MacDonald in awarding the North Hill Management contract to CALM Golf in January 2009.

DISCUSSION

I. Motion for Judgment Notwithstanding the Verdict

A party who has previously moved for a directed verdict and been denied may then move for judgment notwithstanding the verdict "[n]ot later than 10 days after entry of judgment . . . ." Mass. R. Civ. P. 50(b). Judgment notwithstanding the verdict "should be granted 'cautiously and sparingly,' and should only be granted if the trial judge is satisfied that the jury 'failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law.'" Netherwood v. Am. Fed'n of State, County & Mun. Employees, Local 1725, 53 Mass. App. Ct. 11, 20 (2001) (citations omitted). When deciding a defendant's motion for judgment notwithstanding the verdict, "the judge's task, 'taking into account all of the evidence in its aspect most favorable to the plaintiff, [is] to determine whether, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, the jury reasonably could return a verdict for the plaintiff.'" DeSantis v. Commonwealth Energy Sys., 68 Mass. App. Ct. 759, 762 (2007) (quoting Totsi v. Ayik, 394 Mass. 482, 494 (1985)).

The defendants first move under Mass.R.Civ.P. 50(b) for judgment notwithstanding the verdict on the jury's finding regarding G. L. c. 93A. The defendants make three arguments in support of their motion. First, they argue that the Town did not engage in trade or commerce when it solicited bids under G. L. c. 30B, as the Town performed a governmental function. Second, they claim that Chapter 93A cannot apply because Johnson Golf must pursue a remedy under G. L. c. 30A. Lastly, the defendants contend that the Town is entitled to sovereign immunity as governmental entities are immune from suit under Chapter 93A.

Presently, no appellate case in the Commonwealth has squarely addressed the issue of

whether a municipality may in some circumstances be subject to liability under G. L. c. 93A.[3] See Park Drive Towing, Inc. v. City of Revere, 442 Mass. 80, 86 (2004). That said, the Supreme Judicial Court has stated "a municipality is not liable under G. L. c. 93A when it is not 'acting in a business context,' that is, when it is not engaged in 'trade or commerce.'" Id. (quoting Lantner v. Carson, 374 Mass. 606, 611 (1978)). The "trade or commerce" inquiry depends on "the nature of the transaction, the character of the parties involved, and [their] activities . . . and whether the transaction [was] motivated by business . . . reasons." Park Drive Towing, Inc., 442 Mass. at 86 (quoting Boston Hous. Auth. v. Howard, 427 Mass. 537, 538 (1998)). It is established that "a party is not engaging in 'trade or commerce' . . . when its actions are motivated by legislative mandate."[4] Park Drive Towing, Inc., 442 Mass. at 86; see also M. O'Connor Contr., Inc. v. City of Brockton, 61 Mass. App. Ct. 278, 284 (2004) ("[A]t a minimum it is well established that governmental entities are not amenable to suit under c. 93A when they have engaged in governmental activity rather than trade or commerce.").

At oral argument before the Court, counsel for the Town argued that the relevant case law is clearly trending toward declining to extend Chapter 93A liability to government entities and urged this Court to follow suit. However, as this Court sits today, in the absence of definitive guidance from the appellate courts, this Court will not conclude that municipalities acting in a

[3] The Court, however, notes the existence of a split of opinion by the Justices of the Superior Court. Notably, in an earlier opinion in this case denying the defendants summary judgment, Judge Smith found that the Town had engaged in "trade or commerce." Yet, in a case with similar facts, Judge Sikora found that the City of Boston, acting under G. L. c. 30B, had not engaged in "trade or commerce." See Johnson Golf Management, Inc. v. Town of Duxbury, SUCV 2008-04641, slip. op. (Mass. Super. Nov. 24, 2010) (Smith, J.); Johnson Turf and Golf Management, Inc. v. City of Boston, SUCV 2001-05637, slip. op. (Mass. Super. Dec. 27, 2006) (Sikora, J.).

[4] For instances where the SJC has found a municipality to be engaged in activity that is governmental in nature rather than commercial see, e.g., Park Drive Towing, Inc., 442 Mass. at 86 (procurement of snow plowing services); Boston Hous. Auth., 427 Mass. at 538 (Housing Authority's rental of apartments); Peabody, Inc., N.E. v. Marshfield, 426 Mass. 436, 439-440 (1998) (construction of municipal waste facility); All Seasons Services, Inc. v. Comm'r of Health and Hospitals of Boston, 416 Mass. 269, 271-272 (1993) (procurement of food and vending services for city hospital); Clean Harbors of Braintree, Inc. v. Board of Health of Braintree, 409 Mass. 834, 841 (1991) (operation of hazardous waste facility); U.S. Leasing Corp. v. Chicopee, 402 Mass. 228, 232-233 (1988) (lease of computer system of school department).

business context are not amenable to suit under G. L. c. 93A. Moreover, had the SJC wished to exempt municipalities from liability under Chapter 93A, it could have done so already on any number of occasions. See, e.g., United States Leasing Corp., 402 Mass. at 232 ("We need not decide . . . whether municipalities may in some circumstances be amenable to c. 93A claims . . . .").

Here, even a cursory glance at the facts surrounding the Town's ownership of the golf course make clear that it does not in any way relate to governmental activity. The Town's primary motivation for leasing the golf course to a management company is to earn a profit, its ownership has not been mandated by the legislature, nor is it linked, even indirectly, to any of its municipal responsibilities. Cf. Park Drive Towing, Inc., 442 Mass. at 86 (city not engaged in "trade or commerce" when its participation in transaction was "merely incidental" to a primary governmental function). Furthermore, the defendants, in their Answer, admit that the Town had engaged in trade or commerce through its ownership of the golf course.

Nevertheless, the Town argues that it acted pursuant to its legislative mandate and performed a governmental function, due to the requirements imposed by G. L. c. 30B on the Town when it solicited bids for the management contract.[5] The opening sentence to the statute announces that it shall apply to "every contract for the procurement of supplies, services or real property and for disposing of supplies or real property by a governmental body . . . ." G. L. c. 30B, § 1. The Town contends that these mandatory regulatory requirements imposed by the act rendered the underlying bidding process in this case a public transaction that exempted it from the usual rules governing trade or commerce.

The defendants rely on Phipps Products Corp. v. Massachusetts Bay Transp. Auth., 387

[5] General Laws c. 30B, the Uniform Procurement Act, mandates that certain municipal contracts be awarded by competitive, advertised bidding, and sets out requirements for this procurement process.

Mass. 687 (1982) to support their argument that the applicability of the bidding laws caused the transaction to be governmental in nature. In Phipps Products Corp., the Massachusetts Bay Transportation Authority used its own failure to adhere to the public bidding process of G. L. c. 161A, § 5(b) as a pretext for evasion of a contractual duty to sell real property to the plaintiff. Id. at 688. The SJC held that the contract was unenforceable, stating: "[t]his court has required strict adherence to bidding requirements even where no harm to the public authority was shown; where the violation benefited the public; and where there was no showing of bad faith or corruption." Id. at 692 (citations omitted). The court explained that while it "would extend little sympathy to a private citizen who acted similarly in a private transaction. . . . [T]he public interest in compliance with bidding procedures established by law overrides the equities that would appropriately be considered in a purely private transaction." Id. at 693.

In this case, however, Johnson Golf is not seeking specific performance or other equitable relief to enforce a contract between it and the Town. Contrary to the defendants' assertion, Phipps Products Corp. does not stand for the broad proposition that the failure to abide by public bidding procedures immunizes a government entity from all private rights of action. Accordingly, it is this Court's conclusion that Chapter 30B, while a regulatory requirement imposed only on governmental entities, does not automatically convert an activity in connection with the statute (i.e., owning a golf course) a government function as well. Stated differently, G. L. c. 30B cannot be used as a shield to exempt a municipality's activity in "trade or commerce" by bringing the commercial activity under the umbrella of a municipality's legislative mandate.

The defendants next contend that judgment notwithstanding the verdict should enter because a remedy is available for Johnson Golf under G. L. c. 30A. Specifically, the defendants point out that Massachusetts courts have fashioned damages remedies for those aggrieved by a

governmental entity's breach of the public bidding statutory requirements. See New England Insulation Co. v. General Dynamics Corp., 26 Mass. App. Ct. 28, 30 (1988) ("Where the bid solicitor is a governmental entity, numerous cases impose liability on an implied contract theory."). Defendants cite three cases in support of their argument. See id., Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass. App. Ct. 349 (1987), and Paul Sardella Constr. Co. v. Braintree Hous. Auth., 3 Mass. App. Ct. 326 (1975). However, these cases are inapposite to the facts of this case: New England Insulation Co. dealt with the solicitation of bids between two private companies and neither Bradford & Bigelow, Inc. nor Paul Sardella Constr. Co. involved a public authority engaging in "trade or commerce" under Chapter 93A. Moreover, the defendants do not argue nor does a review of both G. L. c. 30B and the case law suggest that one aggrieved by a violation of the public bidding statute may only recover damages under one specific theory of recovery.

Lastly, the defendants argue judgment notwithstanding the verdict should enter because the Town is not subject to suit under G. L. c. 93A, as the statute does not waive sovereign immunity explicitly, nor do its terms imply waiver. Under Massachusetts law, the state and its subdivisions are immune from suit "unless consent to suit has been 'expressed by the terms of a statute, or appears by necessary implication from them.'" Bain v. City of Springfield, 424 Mass. 758, 763 (1997) (quoting C & M Constr. Co. v. Commonwealth, 396 Mass. 390, 392 (1985)).

"Whether a governmental entity is ever amenable to suit under c. 93A remains an open issue" under Massachusetts law. M. O'Connor Contr., Inc., 61 Mass. App. Ct. at 284 n.8. As explained in M. O'Connor,

> The question is controversial because c. 93A contains no explicit indication that governmental entities are to be liable under its provisions. Both § 11 and § 9 of c. 93A require that the defendant be a "person" engaged in trade or commerce. "Person" is defined in the statute as including "natural persons, corporations,

> trusts, partnerships, incorporated or unincorporated associations, and any other legal entity." G. L. c. 93A, § 1(a). Although the term "person" ordinarily is not construed as including the State or its political subdivisions, uncertainty exists because only a "person" may bring suit under c. 93A and governmental entities have been considered to have standing to do so.

Id. (citations omitted). No appellate case in the Commonwealth has ruled on whether c. 93A constitutes an implicit waiver of sovereign immunity. See Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V. v. Whitehead Institute, 850 F. Supp. 2d 317, 330 (D. Mass. 2011) (holding that c. 93A does not impliedly waive sovereign immunity); see also Estate of Janowicz v. Mass. State Lottery Comm'n, 2 Mass. L. Rep. 607, 10 (Mass. Super. 1994) (Commonwealth has not implicitly consented to be sued under Chapter 93A). But see B & R Realty Co. v. Springfield Redevelopment Auth., 708 F. Supp. 450, 457 (1989) (City of Springfield is subject to suit under c. 93A); Pierce v. Dew, 626 F. Supp. 386, 388 (1986) (Secretary of Housing and Urban Development is subject to suit under c. 93A).

Here, this Court concludes that Chapter 93A applies to governmental entities, as the statute contains an implicit waiver of sovereign immunity. The Court makes this determination for the following reasons.

In general, the term "person" as it is used in the General Laws does not encompass the Commonwealth or any of its governmental entities.[6] See G. L. c. 4, § 7. General Laws c. 93A, with its unique definition section including "any other legal entity" as a "person," evidences the Legislature's intention to extend the definition of "person" under the statute as broadly as possible.[7] This Court does note that elsewhere in the General Laws, "person" is explicitly

[6] General Laws c. 4, § 7 states: "[I]n construing statutes the following words shall have the meanings herein given, unless a contrary intention clearly appears: . . . 'Person' or 'whoever' shall include corporations, societies, associations and partnerships." See Woods Hole v. Town of Falmouth, 74 Mass. App. Ct. 444, 447 (2009) ("As has been many times observed, this definition does not encompass governmental agencies, municipalities, or municipal corporations.") (citation omitted).

[7] See also Bretton v. State Lottery Comm'n, 41 Mass. App. Ct. 736, 738 n.5 (1996). The Appeals Court in Bretton

defined to include the government and its subdivisions or agencies.[8] However, despite this omission in G. L. c. 93A, § 1, this Court is still lead to believe that the government is included as "any other legal entity" under the statute because of how broadly "person" is defined, the statute does not contain any legislative intent to exclude the government from the statute's operation, and by the "rule of statutory construction which suggests that words used in one place within a statute be given the same meaning when found in other parts of the statute . . . ." Lantner v. Carson, 374 Mass. 606, 611 (1978) (citations omitted).

Furthermore, if like here, sovereign immunity is not waived expressly by statute, the court must consider whether "governmental liability is necessary to effectuate the legislative purpose" of the statute. Todino v. Town of Wellfleet, 448 Mass. 234, 238 (2007); see also Kilbane v. Secretary of Human Services, 14 Mass. App. Ct. 286, 288 (1982) (if the wrong to be prevented by the statute is of a "sufficiently scaring quality," the State's consent to be sued will be implied). The SJC has declared that Chapter 93A "is a statute of broad impact which creates new substantive rights and provides new procedural devices for the enforcement of those rights." Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693 (1975). The conduct proscribed by Chapter 93A is not simply a failure to fulfill business obligations or a violation of contract terms, but those commercial acts or practices which are deceptive, unfair, fraudulent, or tortious in nature. Although generally a municipality may not be thought of an entity that actively engages in activities for profit, here, the motivation behind the Town's ownership of the golf course is a

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noted that the SJC, in City of Boston v. Aetna Life Ins. Co., 399 Mass. 569, 575 (1987), held that if there is a standing requirement under G. L. c. 93A, § 11, the City of Boston "surely" met that test as "a 'person who engages in the conduct of any trade or commerce.'" The Appeals Court, however, also noted that in All Seasons Servs. v. Comm'r. of Health & Hosps., 416 Mass. 269, 272 (1993), the SJC distinguished City of Boston by stating that the Boston City Hospital acted as an assignee of its patients' claims against the defendants.

[8] See, e.g., G. L. c. 21E, § 2; G. L. c. 94C, § 1; G. L. c. 110A, § 401(h); G. L. c. 151B, § 1(1).

desire to benefit financially.[9] The jury found that the Town committed a willful or knowing unfair or deceptive act or practice toward Johnson Golf. In short, the Town had "inserted itself into the marketplace in a way that makes it only proper that it be subject to rules of ethical behavior and fair play." Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 27 (1997). Therefore, if Chapter 93A is to have fair application for every party that engages in "trade or commerce," whether it is a municipality or a private company, governmental liability under the statute is necessary to effectuate its legislative purpose.

II. Motion to Alter and Amend the Judgment

"[R]ule 59(e) is designed to correct judgments which are erroneous because they lack legal or factual justification." Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n, 394 Mass. 233, 237 (1985). The defendants argue that the jury's verdict on Johnson Golf's Chapter 93A claim cannot stand because there is a lack of evidence to support a conclusion that the defendants' role in the procurement process was "unfair or deceptive." The crux of the defendants' argument in support of their Rule 59(e) motion is that because the jury found that the defendants violated G. L. c. 30B, but did not do so in bad faith, the jury's verdict regarding Chapter 93A is inconsistent with that determination under Chapter 30B. In other words, the jury's finding on the Chapter 93A claim was contrary to the law and the facts because the defendants could not have violated Chapter 93A in the absence of a bad faith violation under G. L. c. 30B.

General Laws c. 93A prohibits "unfair or deceptive acts or practices in the conduct of any

[9] *It makes no difference to this Court how the Town uses the money it gains from its ownership of the golf course.* Even if all the profit derived from its ownership is used solely to benefit the public good, the fact remains that the Town earned that money by engaging in trade or commerce. "If accumulating wealth that could be used for some unspecified public purpose . . . were enough to qualify an action as 'governmental activity' outside the realm of trade or commerce, then no governmental entity would ever be engaged in trade or commerce for purposes of Chapter 93A. This would render the state courts' distinction between trade and commerce and government activity meaningless." Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V., 850 F. Supp. 2d at 329.

trade or commerce . . . ." G. L. c. 93A, § 2. Because the statute "does not itself define what constitutes an unfair act or practice," Datacomm Interface, Inc. v. Computerworld, Inc., 396 Mass. 760, 778 (1986), Massachusetts courts rely on the interpretation of unfairness by the Federal Trade Commission in identifying the "considerations to be used in determining whether a practice is to be deemed unfair." Id. (citations omitted). They are: "(1) whether the practice . . . is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to . . . competitors or other businessmen.'" PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975)). It is also recognized that what constitutes "unfair or deceptive acts or practices" is "broad enough to take in some reprehensible acts committed in business contexts that elude conventional definitions and categories." Doliner v. Brown, 21 Mass. App. Ct. 692, 697 (1986).

Here, the evidence fully supports the jury's determination that the defendants, while they may have not engaged in bad faith in violating G. L. c. 30B, they did however, commit an unfair or deceptive act or practice in violation of G. L. c. 93A. Duxbury officials repeatedly lied to the Court, the Inspector General and others concerning the person or persons who drafted the RFPs and included language about "comparable business enterprise." Duxbury acting through its Chief Procurement Officer, Richard Macdonald, fabricated facts in its award letter of January 15, 2009. Duxbury lied about qualifications of CALM Golf to justify an award to a company without any assets or the required experience to be considered for an award. The jury's decisions are not, as the defendants suggest, inconsistent with each other. Finding "bad faith" on the part of a defendant is not a prerequisite or a necessary element for finding a violation of G. L. c. 93A, § 11. In fact, "[b]ased on ordinary usage, conduct can be 'arbitrary' and perhaps even 'unfair'

without subjective bad faith . . . ." Coady Corp. v. Toyota Motor Distribs., 361 F.3d 50, 56 (2004). Lastly, the FTC's definition of unfairness adopted by the SJC in determining whether one's actions are unfair or deceptive under Chapter 93A, do not contain any reference to notions of bad faith. See PMP Assocs., Inc. 366 Mass. at 596; see also FTC v. Sperry & Hutchinson, 405 U.S. 233, 244 n.5 (1972).

III. Application for Attorneys' Fees and Costs

Determination of what constitutes a reasonable fee award is a matter left to the sound discretion of the judge. Berman v. Linnane, 434 Mass. 301, 302-303 (2001). Attorneys' fees are to be determined by the lodestar method of computation, which requires multiplying the total number of hours reasonably spent preparing and litigating a case by the fair market rate. Fontaine v. Ebtec Corp., 415 Mass. 309, 324 (1993). The party seeking the fees bears the burden of establishing the reasonableness of both components. See Society of Jesus of New Eng. v. Boston Landmarks Comm'n, 411 Mass. 754, 759 (1992). Hours that are "excessive, redundant, duplicative, or unproductive" are not reasonable. T&D Video, Inc. v. City of Revere, 66 Mass. App. Ct. 461, 476 (2006), reversed on other grounds, 450 Mass. 107 (2007).

In determining the reasonableness of the hours spent, this Court may consider, among other things: the length of the trial, the difficulty of the legal and factual issues, the amount of damages involved, and the result obtained. Linthicum v. Archambault, 379 Mass. 381, 388-389 (1979); see also Heller v. Silverbranch Const. Corp., 376 Mass. 621, 629 (1978). Factors bearing on the reasonableness of the hourly rate include: the degree of competence demonstrated by the attorney, the attorney's experience, skill, and reputation, and the usual prices charged by attorneys of similar experience in the same area. Id. No single factor is dispositive on the issue of reasonableness, and a factor-by-factor analysis, although helpful, is unnecessary. Berman, 434

Mass. at 303.

Here, plaintiff's counsel asks the Court to approve an award for attorneys' fees and costs in the amount of $484,146.60. The defendants, while opposing counsel's request, alternatively suggest that an award for fees and costs totaling $210,000 is more reasonable. The award of attorneys' fees is required by G. L. c. 93A, § 11 upon a finding that a claimant has been adversely affected by an unfair or deceptive act or practice. Drywall Systems, Inc. v. ZVI Const. Co., Inc., 435 Mass. 664, 672-673 (2002). General Laws c. 93A, § 11, states: "[i]f the court finds in any action commenced hereunder, that there has been a violation of section two, the petitioner shall, in addition to other relief provided for by this section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and costs incurred in said action." In order to be entitled to an award of attorneys' fees, the defendant's unfair or deceptive act or practice must have had some adverse effect upon the plaintiff. See Martha's Vineyard Auto Village, Inc. v. Newman, 30 Mass. App. Ct. 363, 370 (1991). Here, the jury answered affirmatively that the Town's willful or knowing unfair or deceptive act or practice was a substantial factor in causing a loss of money to Johnson Golf. Accordingly, an award of attorneys' fees and costs is appropriate. However, in reviewing counsel's petition for fees and costs, the Court takes particular issue with the following:

1. In counsel's submission to the Court, there are roughly 740 billing entries totaling over $110,000 for telephone conferences with Mr. Johnson that fail to provide any description of the topic or purpose of the conversation. Additionally, there are nearly a 100 entries totaling over $10,000 for telephone conferences with "others" or with "Johnson and others," also without any description of the topic or purpose of each conversation. These entries are inconsistent with the principle that attorney's records be kept in sufficient detail to permit "a fair evaluation of the

time expended, the nature and need for the service, and the reasonable fees to be allowed." Hensley v. Eckerhart, 461 U.S. 424, 441 (1983) (Burger, C.J., concurring). Counsel should "at least . . . identify the general subject matter of his time expenditures." Id. at 437 n.12. Here, as far as the Court can tell, none of counsel's entries for the above referenced conversations include any such description.

2. Counsel seeks $14,815 for an expert witness, Mr. Bryan J. Morrisey, CPA CVA. Mr. Morrisey prepared three separate reports in which he sought to predict the same thing, gross profits of the golf course for 2009-2013. He prepared three reports because of incorrect computations in each previous report. Further, the Court had to delay his cross-examination because he produced a new report on the day the Court scheduled him to take the witness stand. Lastly, while his reports detailed calculated lost gross profits, the appropriate measurement in calculating damages is net profits, not gross profits. Accordingly, his testimony had limited value for the jury. Requiring the defendants to foot the bill for such work would be unreasonable.

3. Counsel, on March 30, 2009, billed $3,275 per hour for two hours reviewing interrogatories and document requests. This is plainly excessive and unreasonable. In light of counsel's rate of $325 per hour that is used throughout his billing worksheet, the Court assumes this entry to be a typographical error.

4. Finally, the Court also takes into account the fact that the total amount requested is larger than the final judgment of $400,000 in this case. Certainly, while the result obtained on behalf of Johnson Golf was a good one and the legal work was of a high quality, allowing an award exceeding the final judgment here is disproportionate to the results obtained.

Accordingly, for the foregoing reasons, the Court awards attorneys' fees and costs totaling $325,000.

CONCLUSION AND ORDER

For the foregoing reasons, the Court hereby **ORDERS**:

1. The defendants' motion for judgment notwithstanding the verdict is **DENIED**.
2. The defendants' motion to alter and amend the judgment on the G. L. c. 93A claim is **DENIED**.
3. The plaintiff's petition for attorneys' fees and costs is **ALLOWED** in the amount of $325,000.

Kenneth V. Desmond, Jr.
Justice of the Superior Court

Dated: September 13, 2013

Print

PART I ADMINISTRATION OF THE GOVERNMENT
TITLE III LAWS RELATING TO STATE OFFICERS
CHAPTER 30B UNIFORM PROCUREMENT ACT
Section 6 Competitive sealed proposals; requests for proposals; additional evaluation criteria

Section 6. (a) A chief procurement officer may enter into procurement contracts in the amount of $25,000 or more utilizing competitive sealed proposals, in accordance with the provisions of this section. The chief procurement officer shall not solicit competitive sealed proposals unless he has determined in writing that selection of the most advantageous offer requires comparative judgments of factors in addition to price, specifying the reasons for his determination.

(b) The chief procurement officer shall solicit proposals through a request for proposals. The request for proposals shall include:

(1) the time and date for receipt of proposals, the address of the office to which the proposals are to be delivered, the maximum time for proposal acceptance by the governmental body;

(2) the purchase description and all evaluation criteria that will be utilized pursuant to paragraph (e); and

(3) all contractual terms and conditions applicable to the procurement provided that the contract may incorporate by reference a plan submitted by the selected offeror for providing the required supplies or services.

The request for proposals may incorporate documents by reference; provided, however, that the request for proposals specifies where prospective offerors may obtain the documents. The request for proposals shall provide for the separate submission of price, and shall indicate when and how the offerors shall submit the price. The chief procurement officer shall make copies of the request for proposals available to all persons on an equal basis.

(c) Public notice of the request for proposals shall conform to the procedures set forth in paragraph (c) of section five.

(d) The chief procurement officer shall not open the proposals publicly, but shall open them in the presence of one or more witnesses at the time specified in the request for proposals. Notwithstanding the provisions of section seven of chapter four, until the completion of the evaluations, or until the time for acceptance specified in the request for proposals, whichever occurs earlier, the contents of the proposals shall remain

confidential and shall not be disclosed to competing offerors. At the opening of proposals the chief procurement officer shall prepare a register of proposals which shall include the name of each offeror and the number of modifications, if any, received. The register of proposals shall be open for public inspection. The chief procurement officer may open the price proposals at a later time, and shall open the price proposals so as to avoid disclosure to the individuals evaluating the proposals on the basis of criteria other than price.

(e) The chief procurement officer shall designate the individual or individuals responsible for the evaluation of the proposals on the basis of criteria other than price. The designated individuals shall prepare their evaluations based solely on the criteria set forth in the request for proposals. Such criteria shall include all standards by which acceptability will be determined as to quality, workmanship, results of inspections and tests, and suitability for a particular purpose, and shall also include all other performance measures that will be utilized. The evaluations shall specify in writing:

(1) for each evaluation criterion, a rating of each proposal as highly advantageous, advantageous, not advantageous, or unacceptable, and the reasons for the rating;

(2) a composite rating for each proposal, and the reasons for the rating; and

(3) revisions, if any, to each proposed plan for providing the required supplies or services which should be obtained by negotiation prior to awarding the contract to the offeror of the proposal.

(f) A proposal may be corrected, modified or withdrawn to the extent provided in paragraph (f) of section five.

(g) The chief procurement officer shall determine the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals. The chief procurement officer shall award the contract by written notice to the selected offeror within the time for acceptance specified in the request for proposals. The parties may extend the time for acceptance by mutual agreement. The chief procurement officer may condition an award on successful negotiation of the revisions specified in the evaluation, and shall explain in writing the reasons for omitting any such revision from a plan incorporated by reference in the contract.

(h) If the chief procurement officer awards the contract to an offeror who did not submit the lowest price, the chief procurement officer shall explain the reasons for the award in writing, specifying in reasonable detail the basis for determining that the quality of supplies or services under the contract will not exceed the governmental body's actual needs.

(i) If a contract requiring payment to the governmental body of a net monetary sum is awarded to an offeror who did not submit the highest price, the chief procurement officer shall explain the reasons for the award in writing as set forth in paragraph (h).

(j) Notwithstanding the provisions of this section, with respect to contracts for the recycling or composting of solid waste or the treatment, composting or disposal of sewage, septage or sludge at a facility to be owned and constructed by a private party or parties whether such facility will be, located on public or private land, the request for proposals may include proposed contractual terms and conditions to be incorporated into the contract, some of which may be deemed mandatory or non-negotiable, provided that the request for proposals may request proposals or offer options for fulfillment of other contractual terms. The chief procurement officer shall make a preliminary determination of the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals. The chief procurement officer may negotiate all terms of the contract not deemed mandatory or non-negotiable with such offeror. If after negotiation with such offeror, the chief procurement officer determines that it is in the best interests of the governmental body, the chief procurement officer may determine the proposal which is the next most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals, and may negotiate all terms of the contract with such offeror. The chief procurement officer shall award the contract to the most advantageous proposal from a responsible and responsive offeror taking into consideration price, the evaluated criteria set forth in the request for proposals, and the terms of the negotiated contract. The chief procurement officer shall award the contract by written notice to the selected offeror within the time for acceptance specified in the request for proposals. The time for acceptance may be extended for up to 45 days by mutual agreement between the governmental body and the responsible and responsive offeror offering the most advantageous proposal as determined by the chief procurement officer.

(k) Notwithstanding the provisions of this section, with respect to contracts for energy-related services entered into by a city or town or group of cities or towns, the requests for proposals may include proposed contractual terms and conditions to be incorporated into the contract, some of which may be deemed mandatory or non-negotiable; provided, however, that the request for proposals may request proposals or offer options for fulfillment of other contractual terms. The chief procurement officer shall make a preliminary determination of the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in a request for proposals. The chief procurement officer may negotiate all terms of the contract not deemed mandatory or non-negotiable with such offeror. If after negotiation with such offeror the chief procurement officer determines that it is in the best interest of the governmental body, the chief procurement officer may determine the proposal which is the next most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals, and may negotiate all terms of the

contract with such offeror. The chief procurement officer shall award the contract to the most advantageous proposal from a responsible and responsive offeror taking into consideration price, the evaluated criteria set forth in the request for proposals, and the terms of the negotiated contract. The chief procurement officer shall award the contract by written notice to the selected offeror within the time for acceptance specified in the request for proposals. The parties may extend the time for acceptance by mutual agreement.

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PART I ADMINISTRATION OF THE GOVERNMENT
TITLE XV REGULATION OF TRADE
CHAPTER 93A REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION
Section 1 Definitions

Section 1. The following words, as used in this chapter unless the text otherwise requires or a different meaning is specifically required, shall mean—

(a) "Person" shall include, where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(b) "Trade" and "commerce" shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in subparagraph (k) of section four hundred and one of chapter one hundred and ten A and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

(c) "Documentary material" shall include the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(d) "Examination of documentary material", the inspection, study, or copying of any such material, and the taking of testimony under oath or acknowledgment in respect of any such documentary material.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 01-5637-A

Notice sent
1/03/2007
K. M. B.
B. & F.
E. A. P. S.
R. & C.
T. I. E.
(sc) F. & L.

JOHNSON TURF AND GOLF MANAGEMENT, INC.,

Plaintiff,

V.

THE CITY OF BOSTON
And
THE FUND FOR BOSTON PARKS AND RECREATION,

Defendants.

MEMORANDUM OF LAW
Upon
THE APPLICABILITY OF c. 93A LIABILITY
TO THE ACTION OF THE MUNICIPAL DEFENDANTS.

RULING.

Upon consideration of all written materials submitted by the plaintiff Johnson Turf and Golf Management, Inc. and the defendants City of Boston and Fund for Boston Parks and Recreation and upon consideration of oral arguments submitted by capable counsel for both sides, the court concludes and rules that c. 93A liability does not apply to the conduct of the municipal defendants. The reasons follow.

REASONING.

Introduction.

By its Amended Complaint submitted and allowed shortly before trial by jury, the plaintiff Johnson Turf and Golf Management, Inc. ("Johnson Turf") alleged in Count Eleven that the municipal defendants had committed unfair acts or practices in trade or commerce within the meaning of G.L. c. 93A, §§ 2 and 11, by the award in 2001 of a three-year contract for the management of the Franklin Park Golf Course to a competing bidder upon the basis of favoritism rather than upon the basis of merit.

The gravamen of Johnson Turf's complaint (Counts One through Three) was the claim that the municipal defendants had violated the standards of the Massachusetts Uniform

Procurement Act, G.L. c. 30B, §§ 1 through 6. Those provisions set out a detailed procedure for the purchase by governmental entities of goods and services by fair, open, and merit-based competitive bidding by vendors.

The court conducted a substantial trial by jury during the latter part of July, and into the early days of August, 2006. On or about August 3, the jury rendered a verdict upon liability in favor of Johnson Turf. Specifically, in answer to a special verdict question, it found that the municipal defendants did "award the Franklin Park Golf Course contract by reason of favoritism rather than by reason of the merits of the competing proposals."

The verdict resolved the issue of liability only. The parties had not completed their preparation of the issues of damages. A damages trial by jury will ensue shortly.

Meanwhile it is necessary to resolve the issue of law whether c. 93A liability applies to the actions of the municipal defendants in this case. I reserved that issue of law or issue of mixed law and fact from the jury. See Poly v. Moylan, 423 Mass. 141, 151 (1996); Nei v. Burley, 388 Mass. 307, 315 (1983); Simes v. House of Cabinets, Inc., 53 Mass. App. Ct. 131, 141 (2001); Wyler v. Bonnell Motors, Inc., 35 Mass. App. Ct. 563, 566-569 (1993); and Chamberlayne School & Chamberlayne Junior College v. Banker, 30 Mass. App. Ct. 346, 354-355 (1991). For the following reasons I conclude that 93A liability does not apply to the actions of the municipal defendants.

I. The Governmental Character of the Defendants' Conduct.

To date no Massachusetts precedent has found a municipality to have engaged in "trade or commerce" within the reach of c. 93A liability. At the same time the decisions have not resolved the categorical question whether a municipality may ever be liable under c. 93A for unfair acts or practices in commerce. For specific instances in which the court has found the action of the municipality to be essentially governmental or public in purpose rather than commercial, see, e.g., Park Drive Towing, Inc. v. Revere, 442 Mass. 80, 86 (2004) (procurement of snow plowing services); Boston Housing Authority v. Howard, 427 Mass. 537, 538, 539 (1998) (Housing Authority's rental of apartments); Peabody, Inc., N.E. v. Marshfield, 426 Mass. 436, 439-440 (1998) (construction of municipal waste facility); All Seasons Services, Inc. v. Commissioner of Health and Hospitals of Boston, 416 Mass. 269, 271-272 (1993) (procurement of food and vending services for city hospital); Clean Harbors of Braintree, Inc. v. Board of Health of Braintree, 409 Mass. 834, 841 (1991) (operation of hazardous waste facility); U.S. Leasing Corp. v. Chicopee, 402 Mass. 228, 232-233 (1988) (lease of computer system for school department).

Our case deals with the letting of a substantial contract for the management of a municipal golf course. The question reduces to the determination whether that function constitutes predominantly a governmental activity or a commercial activity on the part of the municipal proprietors. The central character of the contract formation was its thorough regulation by the Uniform Procurement Act. The opening sentence of G.L. c. 30B, § 1,

announces, "This chapter shall apply to every contract for the procurement of supplies, services or real property and for disposing of supplies or real property by a governmental body as defined herein." Sections One through Six go on to describe a detailed process of invitation of bids, evaluation of bids, and justification for the award of a contract to the prevailing bidder.

The statutory process serves the purposes of (a) the public interest in the most informed choice of price and quality of goods and services by the government as a purchaser; and (b) fair opportunity and treatment for the providers bidding to sell goods and services to the government. Obviously private actors in the marketplace do not bear the regulatory responsibilities of this process. The Uniform Procurement Act operates specifically and distinctively upon governmental purchasers of goods and services. It imposes responsibility upon governmental buyers different from those engaged in general trade and commerce. The jury here found that Boston and its Fund, as an "instrumentality," had not performed their duties under the Act. The applicability of the Uniform Procurement Act to distinctly governmental conduct weighs heavily against the applicability of c. 93A and its usual operation amid general trade or commerce in the otherwise unregulated marketplace.

One precedent in particular appears to be telling. In Phipps Products Corporation v. Massachusetts Bay Transportation Authority, 387 Mass. 687, 693-694 (1982), the Supreme Judicial Court observed that the Massachusetts Bay Transportation Authority was employing the public bidding process of G.L. c. 161A, § 5(b), as a pretext for evasion of a contractual duty to sell real property to the plaintiff company. That company had engaged in good faith in the

formation of a contract for the purchase of MBTA land and buildings. When the MBTA underwent a change of administration and a change of mind, it invoked technical noncompliance with the governing public bidding provisions as an excuse to back out of the contract for sale of the real property. The Phipps Company urged the court to impose doctrines of promissory or equitable estoppel upon the MBTA. The court, reluctantly but firmly, declined.

It reasoned that the violation of the public bidding provision embodied an overriding public interest; that the governmental agency, however dishonorable its motivation, had a duty to obey the statute and to serve that public interest; and that consequently it would be free of the usual remedies imposed upon private parties in trade or commerce: "This court would extend little sympathy to a private citizen who acted similarly in a private transaction." However, the public bidding scheme imbued the MBTA with a public character and with the benefit of legal doctrines protecting the public interest and incidentally a public agency.

The parallel to our case is strong. Like the MBTA, the municipal defendants here are now found by the jury to have violated public bidding standards. Even though the transaction viewed narrowly would appear to be one in trade and commerce as an exchange of money for services, the governance of the bidding laws rendered the transaction public and exempted it from the usual rules governing private trade or commerce.

One final factual consideration weighs against the application of c. 93A, as well. In the course of trial, it emerged as an undisputed fact that the revenues received by the City and its

Fund from the contract for management of the Franklin Park Golf Course (and from the companion George Wright Golf Course) go forward to use for maintenance and improvement of general parks and playgrounds throughout the City. The money from the management contract serves a consequential use of a distinctively public character.

Therefore, the combined force of the Uniform Procurement Act, the strong trend of the precedents, and the resulting use of the contractual proceeds all weigh against the characterization of the formation of the golf course management contract as a typical private market activity and therefore against the application of c. 93A.

II. The Availability of a Specific Alternative Remedy.

The availability of specific alternative remedies has served as one ground for the exemption of certain transactions from 93A liability. See, e.g., Zimmerman v. Rogoff, 402 Mass. 650, 662-663 (1988) (alternate liability for breach of fiduciary duty); Riseman v. Orion Research, Inc., 394 Mass. 311, 313-314 (1985) (availability of other statutory and regulatory remedies to stockholders encountering voting rights manipulation); and Manning v. Zuckerman, 388 Mass. 8, 11-12 (1983) (availability of employee remedies).

In the present setting, Massachusetts courts have grafted onto the statutory requirements of fair and open public bidding several damages remedies for breach of those statutory standards by governmental bodies. An invitation to bid and a compliant bid from a vendor form an implied

contract and entitle a wronged bidder to the remedy of compensatory damages for breach of that implied contract. New England Insulation Co. v. General Dynamics Corporation, 26 Mass. App. Ct. 28, 30-31 (1988). An innocent breach by the governmental purchaser entitles a wronged bidder to recovery of its bid preparation costs. Paul Sardella Construction Company v. Braintree Housing Authority, 3 Mass. App. Ct. 326, 333-335 (1975), S.C. 371 Mass. 235, 243 (1976). Accord, Peabody Construction Co. v. Boston, 28 Mass. App. Ct. 100, 105 (1989). A bad faith or intentional breach of statutory standards by a governmental purchaser will entitle the wronged bidder to recovery of lost profits. Bradford & Bigelow, Inc. v. Commonwealth, 24 Mass. App. Ct. 349, 359 (1987); accord, Peabody Construction Co., 28 Mass. App. Ct. at 105-106.

The synthesis of statutory standards and common law damages remedies appears to be tailored to claims of breaches of public bidding laws. This specifically fitted scheme also would weigh against the superimposition of c. 93A liability upon a government violator of the bidding standards.

III. Conservative Application of Punitive Damages.

Multiple damages under c. 93A, have the character of punitive damages. See McEvoy Travel Bureau, Inc. v. Norton Co., 408 Mass. 704, 716-719 (1990) and Patry v. Liberty Mobile Home Sales, Inc., 394 Mass. 270, 272 (1985).

Massachusetts does not recognize any common law or equitable entitlement to punitive

damages. They are the creation of statutes. Typically, a statute must specifically authorize multiple or punitive damages. See, e.g., G.L. c. 231, § 93, final two sentences, withholding punitive damages from defamation actions even in the presence of malice.

Here, the public bidding provisions generally, and the Uniform Procurement Act provisions in particular, G.L. c. 30B, §§ 1 through 6, do not suggest the availability of any punitive damages remedy against governmental offenders. That omission would appear to be significant. That significance may increase because the ultimate source of the payment of punitive damages in behalf of a wrongdoing governmental entity will most typically be the blameless taxpayers of that governmental unit.

CONCLUSION.

For these reasons, c. 93A liability does not apply to the actions of the defendant City of Boston and Fund for Boston Parks and Recreation.

Mitchell J. Sikora, Jr.
Justice of the Superior Court
Dated: December 27, 2006.